IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 04-269-9
	:	
v.	:	
	:	
MELVIN STEIN	:	

MEMORANDUM AND ORDER

McLaughlin, J. June 8, 2005

The Second Superseding Indictment in this case charges six defendants with multiple counts arising from their alleged involvement in a drug trafficking ring. The Court here decides the motion of one of those defendants, Melvin Stein, to suppress statements he made to the government. The Court will grant the defendant's motion in part and deny it in part.

Mr. Stein seeks to suppress two different sets of statements. First, he seeks to suppress any and all statements from two proffer sessions with the government, including any derivative evidence discovered as a result of those statements. The defendant argues that those statements were made "in the course of plea discussions with an attorney for the prosecuting authority" and are therefore protected from disclosure under Federal Rule of Evidence ("FRE") 410 and Federal Rule of Criminal Procedure ("FRCrP") 11(f). Second, the defendant seeks to suppress subsequent statements that he made to investigators during the time when he was actively cooperating with the

government. The defendant seeks to suppress these statements on three alternative grounds: pursuant to FRE 410 and FRCrP 11(f) as statements in the course of plea discussions; pursuant to an implied or express cooperation agreement; or pursuant to the doctrine of "informal" or "equitable" immunity.

An evidentiary hearing and oral argument were held on this motion on January 20th and 21st, 2005. Testifying for the defendant was Mr. Stein's prior counsel, Elizabeth Ainslie, under a waiver of attorney-client privilege. Testifying for the government were Assistant United States Attorney Frank Labor and Special Agent Kevin Lewis of the Federal Bureau of Investigation.

The Court finds that the statements the defendant made in his two proffer sessions with the government were "statements made in the course of plea discussions" within the ambit of FRE 410 and FRCrP 11(f) and therefore inadmissible. The defendant's statements were made in formal meetings with the prosecuting attorney, which both sides understood to be the first step in a multi-stage negotiated process that, if successful, would culminate in a plea. Although the government sought to have the defendant sign a standard proffer letter, waiving certain of his rights under FRE 410 and FRCrP 11(f), it is undisputed that no waiver was ever signed.

The Court, however, will deny the defendant's motion to the extent that it seeks to suppress derivative evidence discovered by the government as a result of Mr. Stein's

statements. Although FRE 410 and FRCrP 11(f) require the suppression of statements made in the course of plea discussions, neither the text of the rules nor the public policy behind them requires or permits the suppression of derivative evidence.

The Court will also deny the defendant's motion to the extent that it seeks to suppress statements the defendant made in the course of his cooperation with the government. Because those statements were made to investigators outside the formal proffer meetings between the prosecution and the defense, they did not take place in the course of plea discussions with government attorneys and are not covered by FRE 410 or FRCrP 11(f). They are also not protected by an implied or express cooperation agreement or by informal or equitable immunity, as there is no evidence in the record that the government ever offered any cooperation or immunity agreement, either implicitly or explicitly.

The Court, however, will enforce what it finds to be a limited oral agreement between the government and the defendant's prior counsel that Mr. Stein would not be questioned outside of counsel's presence about his past activities. On the current state of the record, however, there is insufficient evidence to determine whether any of the defendant's statements were solicited in violation of the agreement. If the government seeks to introduce statements that the defendant made to government agents during his cooperation, the Court will schedule a further evidentiary hearing on the issue.

I. Background

Most of the relevant facts are not in dispute.

As part of a multi-year investigation into an alleged drug trafficking organization, the Federal Bureau of Investigation executed search warrants on the business and home of Melvin Stein on July 21, 2003. The defendant contacted his legal counsel the same day. After speaking to the defendant, defense counsel went to the defendant's home where she spoke with Special Agent Lewis of the FBI and other law enforcement officers who were executing the warrant. 1/20/05 Tr. at 17-18, 94-95 (Ainslie and Labor Testimony).

On either July 21 or 22, 2003, defense counsel spoke to the Assistant United States Attorney in charge of the investigation and was told that Mr. Stein was a target, but not one of the primary targets, in a drug investigation. Defense counsel was also told that the government had substantial evidence against Mr. Stein, including wiretap evidence, and that he was likely to be indicted. Testimony differs as to whether counsel for the government or counsel for the defendant first raised the issue of Mr. Stein's cooperating with the government, but the Court finds no need to resolve the issue. There is no dispute that the subject was discussed and that defense counsel agreed to recommend that her client meet with the government for a proffer session. 1/20/05 Tr. at 18-21, 65-66, 95-97 (Ainslie and Labor Testimony).

A. The Proffer Meetings between Mr. Stein and the Government

The initial proffer session took place at the offices of the United States Attorney on July 24, 2003. Attending were Mr. Stein, his lawyer, two Assistant United States Attorneys, an FBI agent and a police detective. 1/20/05 Tr. at 25-26, 97 (Ainslie and Labor Testimony).

The object of the proffer session was for Mr. Stein to make a full and complete statement to the government detailing his involvement in the alleged criminal activity under investigation. For the defendant, the proffer was made "with the hope that the Government would provide a 5K [the prosecutor's recommendation for a more lenient sentence under United States Sentencing Guideline § 5K1.1], in anticipation that there would be an indictment and a guilty plea to something." 1/20/05 Tr. at 64 (Ainslie Testimony). Section 5K1.1 of the Sentencing Guidelines permits a downward departure from the mandated sentence if a defendant provides "substantial assistance" in an investigation. Defense counsel told this expressly to the Assistant United States Attorney at the start of the meeting: "we're here for – to discuss the possibility of a 5K." Id. at 28.

For the government, the purpose of the proffer was to assess Mr. Stein's usefulness as a cooperating witness. The Assistant United States Attorney explained the government's

position to the defendant at the beginning of the meeting in what he referred to as his "standard speech." 1/20/05 Tr. at 101 (Labor Testimony). He began by telling the defendant that the government had gathered substantial evidence against him and intended to use that evidence to indict him and convict him at trial, and that if convicted he would receive a substantial sentence. Id. at 101-02. The Assistant United States Attorney told Mr. Stein that one of the few ways "to avoid a guideline sentence would be to obtain a departure motion" by cooperating with the government, and for the government to even "consider the possibility of entering into a cooperation agreement with" the defendant, it would have to know whether he had any information that would be useful in the investigation and whether he was "the type of person who is capable and willing to tell the truth." Id. at 102. The "purpose of the meeting was for us [the government] to assess what information he had and whether he was a credible witness." Id. at 103.

Neither the defendant nor the government expected to discuss the specific terms of Mr. Stein's plea at the proffer session. Defense counsel believed such a discussion "at that early stage" would have been "premature." 1/20/05 Tr. at 62-63 (Ainslie Testimony). The proffer meetings were "just the first step of a long process, the culmination of which [defense counsel] hoped would be a contract or a plea agreement presented to me by the Government that contained a 5K followed up by a 5K

motion." Id. at 81. The government was unwilling and unprepared to discuss a plea at the proffer sessions because, at that time, it was still evaluating the evidence gathered from the execution of the search warrants on the defendant's home and office only a few days before. 1/20/05 Tr. at 112-14 (Labor Testimony).

B. The Discussion Over Whether the Proffer Was to be Governed by the Government's Standard Proffer Letter

Before the defendant began his proffer, the Assistant United States Attorney in charge of the case offered to have the proffer session covered by what the government refers to as its "standard proffer letter." 1/20/05 Tr. at 98, 146-147 (Labor Testimony). The government had begun preparing a version of this letter for the defendant and his counsel, but the letter had not been finalized when the meeting began and was not provided to the defendant or defense counsel. Id. at 26-27, 98-99 (Ainslie and Labor Testimony). Defense counsel, however, was familiar with the terms of the government's letter and understood its contents. Id. at 30-31, 57-59 (Ainslie Testimony). A copy of the government's incomplete draft was later admitted into evidence at the hearing on this matter. Ex. MS-3.

The draft proffer letter the Assistant United States Attorney was preparing acknowledged that the proffer session was to be off-the-record. The government's letter began: "You have stated that your client, Melvin Stein, is interested in meeting

with the investigating agents and me for purposes of an 'off-the-record' proffer or discussion. We are interested in pursuing this matter and will consider such an 'off-the-record' proffer in formulating an appropriate resolution of this matter." Ex. MS-3.

The proffer letter then set out the government's proposed "ground rules for an 'off-the-record' proffer." The letter stated that none of the defendant's statements or other information provided in the proffer would be used directly against him, but that the government would be allowed to make derivative use of any statements made or information provided. In addition, the letter allowed the government to use statements or information from the proffer in cross-examination or rebuttal if the defendant testified or made representations through counsel that were "materially different" from what was said in the proffer. Finally, the letter also required a partial waiver of the exclusionary rules at issue here and stated that by signing the letter the defendant "waives any right to challenge" derivative use of the proffer statements and "agrees that Federal Rule of Criminal Procedures [sic] 11(e)(6) [the precursor to FRCrP 11(f)] and Federal Rule of Evidence 410 do not govern such derivative use." Ex. MS-3.

Defense counsel, however, declined to have her client sign the proposed proffer letter. 1/20/05 Tr. at 26-27 (Ainslie testimony). By declining the proffer letter, defense counsel did not intend to have the proffer sessions become on-the-record. At

the evidentiary hearing, defense counsel explained that she made a considered decision to decline the letter because she believed FRCrP 11 and FRE 410 protected Mr. Stein's proffer statements from disclosure and she did not want her client to waive any of his rights under those rules. Id. at 29, 32-33, 35-36. For other clients, defense counsel had "regularly" agreed to the government's standard proffer letter when cases were "at an early stage of an investigation" and when she did not "believe that [she and the government were] engaged in plea discussions" protected by FRCrP 11(f) and FRE 410. Id. at 68. But when, as in Mr. Stein's case, defense counsel was "pretty confident in my own mind that it's plea negotiation," she saw "no reason to waive these rights as set forth in the proffer letter." Id.

The government now takes the position that, once the defendant declined to sign the proffer letter, the proffer became on-the-record. However, neither the Assistant United States Attorney in charge, nor any other government official, told the defendant or defense counsel that the government would take this position or that there would be any adverse consequence if the letter was not signed. 1/20/05 Tr. at 106 (Labor testimony); 1/21/05 Tr. at 46 (Lewis testimony). Nothing was discussed about the effect of not signing the letter and neither FRCrP 11 or FRE 410 was mentioned by either the defense or the government. 1/20/05 Tr. at 81, 106, 147-148 (Ainslie and Labor testimony).

After declining to sign the letter, defense counsel suggested that both sides agree to have the proffer governed by section 1B1.8 of the United States Sentencing Guidelines. Id. at 26-27 (Ainslie testimony). Section 1B1.8 authorizes the government to agree that self-incriminating information provided by a defendant in the course of cooperating with an investigation will not be used against him at sentencing. The Assistant United States Attorney declined to discuss a 1B1.8 agreement during the proffer at that time, but left open the possibility of discussing it later. Id.[1]

After counsel's colloquy concerning the proffer letter and the opening remarks by the Assistant United States Attorney, the parties proceeded to the substance of the proffer. Mr. Stein answered questions from the FBI Special Agent for approximately an hour about his involvement in the activities under investigation. Id. at 34-35, 103 (Ainslie and Labor testimony).

[1]There is conflicting testimony as to whether defense counsel raised the issue of a § 1B1.8 agreement at the first or second proffer session. Defense counsel testified that she did so at the first proffer session. Id. at 27 (Ainslie testimony). The Assistant United States Attorney testified that he believed she did so at the second proffer session. Id. at 112-13 (Labor testimony). As defense counsel's notes of the first proffer session (Ex. MS-2B) mention § 1B1.8, the Court finds that the discussion more likely occurred in the first session. In any event, it is undisputed that defense counsel raised the issue at the proffer sessions, that the Assistant United States Attorney put off any discussion of it at that time, and that no § 1B1.8 agreement was ever reached because, as discussed below, the defendant subsequently rejected the government's proposed plea agreement.

A second follow-up proffer session was held two weeks later on August 8, 2003 with the same participants.[2] This meeting was requested by the government to explore discrepancies between statements the defendant made at the first session and the wiretap evidence. Like the first session, the second proceeded without any understanding as to whether it was on or off the record or whether FRCrP 11 or FRE 410 applied. Id. at 42-44, 110-13 (Ainslie and Labor Testimony).

C. Mr. Stein's Subsequent Cooperation with the Government and the Lack of any Agreement As to Whether It Was On or Off the Record

After the second proffer session ended, the government decided it was sufficiently satisfied with Mr. Stein's proffer to accept his cooperation in the investigation. 1/21/05 Tr. at 20-23 (Lewis Testimony). Mr. Stein then cooperated with the government over the next several months by recording conversations with other targets of the investigation at the direction of the FBI. Id. Mr. Stein stopped making these recordings only when the government had collected enough

[2]Defense counsel testified that her notes indicated that one of the two Assistant United States Attorneys present at the first proffer session was not present at the second. 1/20/05 Tr. at 43 (Ainslie testimony). Defense counsel's notes appear to be mistaken, as stipulated testimony from the second Assistant United States Attorney showed she was present for both proffer sessions. 1/21/05 Tr. at 3 (colloquy of counsel).

information to arrest his primary interlocutor in November 2003. 1/20/05 Tr. at 115 (Labor testimony).

Both the government and the defense agree that there was no written or formal agreement governing Mr. Stein's cooperation. 1/20/05 Tr. at 49-50, 80 (Ainslie testimony); Government's Reply to Defendant's Post-Hearing Brief at 12-17. Mr. Stein's counsel testified that she did set one condition for his cooperation. She requested that, although she would not object to investigators talking to Mr. Stein in her absence "about proactive cooperation," she wanted to be present "anytime they spoke with him about his own involvement in the activities they were investigating." 1/20/05 Tr. at 45 (Ainslie testimony). There is no express evidence in the record as to whether the government accepted this condition, although the government has not challenged defense counsel's testimony on this point. It is undisputed that the government had defense counsel's permission to speak to the defendant without counsel's presence and that FBI agents spoke to him daily during the period of his active cooperation. 1/21/05 Tr. at 21, 27 (Lewis Testimony).

D. The Government's Formal Offer of a Plea Agreement and the Breakdown of Cooperation

After Mr. Stein's active cooperation with the government ended, the Assistant United States Attorney called defense counsel to discuss a plea agreement. 1/20/05 Tr. at 73-

74, 115-116 (Ainslie and Labor testimony). Defense counsel was told the government wanted Mr. Stein to plead guilty to money laundering and that the government would prepare a draft plea agreement. Id. at 74, 116. The draft agreement was sent to the defendant on January 26, 2004 and included a provision for a downward sentencing departure under Guideline § 5K1.1, conditioned on Mr. Stein continuing to cooperate to the government's satisfaction. Ex. MS-6. The plea agreement was also supposed to contain a provision under Guideline § 1B1.8, stating that information provided by the defendant in the course of cooperating could not be used against him in sentencing, but that this provision was inadvertently left out of the draft sent to the defense. 1/20/05 Tr. at 55, 118 (Ainslie and Labor testimony).

Soon after receiving the draft agreement, Mr. Stein changed counsel and rejected the proposed plea agreement, and the government considered him no longer to be cooperating with the investigation. Id. at 118-19 (Labor testimony).[3] By letter dated March 3, 2004, the government notified the defendant's new counsel that it considered Mr. Stein's proffer statements and any

[3] In colloquy at the evidentiary hearing, defense counsel strongly contended that Mr. Stein had remained willing to cooperate with the government at this time. 1/20/05 Tr. at 124-26. The issue is not relevant to this motion and will not be addressed here.

statements made during his cooperation to be unprotected by FRCrP 11 or FRE 410 and available to be used against him. Ex. MS-8.

On May 19, 2004, the defendant was indicted for money laundering.[4] The government has represented that no evidence from Mr. Stein's proffer statements or from his cooperation was presented to the grand jury or otherwise used to obtain the indictment.

II. The Exclusionary Rule of FRE 410 and FRCrP 11(f)

Both the government and the defendant agree that the admissibility of the defendant's proffer statements turns on whether the proffer sessions are covered by the exclusionary rule of FRE 410 and FRCrP 11(f). Resolving this question will require a somewhat detailed analysis of the rules' text and history.

A. The Text of the Rule

FRE 410 and FRCrP 11(f) are substantively identical. In pertinent part, the current version of Rule 410 of the Federal Rule of Evidence provides,

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
> . . . . . .
> 4) any statement made in the course of plea discussions with an attorney for the prosecuting

[4]Two superseding indictments have since been filed against Mr. Stein and other defendants in this case. The operative Second Superseding Indictment was filed February 9, 2005.

> authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn."[5]

FRCrP 11(f) refers back to FRE 410: "The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."

FRCrP 11(f) is a relatively new provision, enacted in 2002 as part of a "general restyling of the Criminal Rules." Advisory Committee Notes to the 2002 Amendments to FRCrP 11. Prior to 2002, the section of Rule 11 that dealt with the inadmissibility of pleas and plea discussions was now-deleted subsection FRCrP 11(e)(6), which contained language identical to that which remains in FRE 410. As a consequence, much of the legislative history and case law relevant to these two rules refers to FRCrP 11(e)(6) rather than FRCrP 11(f), and most case law refers to FRCrP 11(e)(6) and FRE 410 interchangeably.

B. The Legislative History

The legislative history of FRE 410 has been described as "the most convoluted" of any of the Federal Rules of Evidence. 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5341 at 332 (1980). Fortunately, for purposes of

[5]FRE 410 contains two exceptions, not at issue here, providing that a statement may be admissible "(i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel."

resolving the issue before the Court, a simplified discussion of the history of the two rules will suffice.

When enacted in 1975, FRE 410 and FRCrP 11(e)(6) contained broader language than the current rules. As originally enacted, FRE 410 and FRCrP 11(e)(6) were not limited only to plea discussions with an attorney for the government, but instead required the exclusion of any "statements made in connection with, and relevant to" withdrawn guilty pleas, nolo contendere pleas or offers to plead. FRCrP 11(e)(6), Pub. L. No. 94-64 (1975); FRE 410, Pub. L. No. 94-149 (1975).

Courts interpreting the broad language of the statute as originally enacted were sharply divided over how far it should extend, particularly over whether the rules' reference to "statements made in connection with" offers to plead required the exclusion of voluntary confessions made to arresting officers in the hopes of obtaining leniency. Compare United States v. Herman, 544 F.2d 791 (5th Cir. 1977) (defendant's statements to postal inspectors inadmissible under FRCrP 11(e)(6) and FRE 410) and United States v. Brooks, 536 F.2d 1137 (6th Cir. 1976) (same) with United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978) (en banc) (defendant's statements to DEA agents admissible under FRCrP 11(e)(6) and FRE 410).

To clarify this issue, Congress amended FRE 410 and FRCrP 11(e)(6) in 1980 and added the current language restricting the scope of the rules to "plea discussions with an attorney for

the prosecuting authority."[6] The Advisory Committee Notes to these amendments make clear that these changes were specifically designed to remove statements made to law enforcement from the scope of the rules and expressly disapprove the contrary decisions reached in Herman and Brooks. Advisory Committee Notes to 1979 Amendments to FRCrP 11 (hereafter "1979 Advisory Committee Notes"); see also Sebetich, 776 F.2d at 421.[7]

The 1979 Advisory Committee Notes explain that the "purpose of [FRE] 410 and [FRCrP] 11(e(6) is to permit the unrestrained candor which produces effective plea discussions between the attorney for the government and the attorney for the defendant or the defendant when acting pro se." Id. (internal quotation omitted). By limiting the rules to statements made to attorneys, the new amendment "fully protects the plea discussion

---

[6]The 1980 amendments to FRE 410 and FRCrP 11(e)(6) use slightly different language. The amendment to FRE 410 refers to "plea discussions with an attorney for the prosecuting authority"; the 1980 amendment to FRCrP 11(e)(6) refers to "plea discussions with an attorney for the government." The Amended Committee Notes to the two rules make no mention of the discrepancy, and the two rules have been interpreted to be indistinguishable. See United States v. Sebetich, 776 F.2d 412, 421 n.13 (3d Cir. 1985) (describing the rules as identical).

[7]The 1979 Advisory Committee Notes refer to these amendments as the "1979 amendments" because they were sent to Congress in that year, although they did not become effective until 1980. The Supreme Court promulgated the amendments on April 30, 1979. By statute, the amendments to FRCrP 11(e)(6) and FRE 410 were to have become effective 90 and 180 days later, respectively, under the then-existing 28 U.S.C. §§ 2072, 2076 (repealed 1988). To allow itself additional time to consider them, Congress delayed the amendments' effective date until December 1, 1980. Act of July 31, 1979, Pub. L. No. 96-42, 93 Stat. 326 (1979).

process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions." Id. Statements made to law enforcement agents, therefore, "are not covered by the per se rule of 11(e)(6) and thus must be resolved by that body of law dealing with police interrogations." Id.

The 1980 amendments also made one other relevant change. As originally enacted, the rules made inadmissible statements "made in connection with, and relevant to" withdrawn guilty pleas, nolo contendere pleas or offers to plead. The 1980 amendments replaced this with simpler language making inadmissible "any statement made in the course of plea discussions." The 1979 Advisory Committee Notes explain this change was intended to "identif[y] with more precision . . . the necessary relationship between the statements and the plea or discussion." The Notes also clarify that "by relating the statements to 'plea discussions,' rather than to 'an offer to plead,' the amendment ensures that even an attempt to open plea bargaining is covered under the same rule of inadmissibility" (internal quotation and citation omitted).

C. The Standard for Determining What Constitutes "Plea Discussions" for Purposes of FRE 410 and FRCrP 11(f)

The 1980 amendments to FRE 410 and FRCrP 11(e)(6) did not achieve their desired effect of making the rules more precise and easier for courts to apply. Subsequent decisions have been sharply divided over how to interpret the rules and how far they should extend.

Courts are divided on the threshold issue of what standard should be applied to determine whether a statement has been made "in the course of plea discussions." Many courts have adopted a two-tiered test articulated in United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978) (en banc).[8] The Robertson court, interpreting the broader pre-1980 version of the rules, held a court must determine "first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and, second, whether the accused's expectation was reasonable given the totality of the objective circumstances." Id. at 1366 (citations omitted). Other courts, however, have found that the Robertson test has been superseded by the 1980 amendments to the rules and have instead adopted a totality of the circumstances test.[9]

---

[8]See, e.g.,United States v. Leon Guerrero, 847 F.2d 1363, 1367-68 (9th Cir. 1988) (adopting Robertson test); United States v. O'Brien, 618 F.2d 1234, 1240-41 (7th Cir. 1980) (same); United States v. Fronk, 173 F.R.D. 59, 67 (W.D.N.Y. 1997) (same).

[9]See, e.g., United States v. Penta, 898 F.2d 815, 818 (1st Cir. 1990) (the amended rule "embraces neither Robertson's two-tiered test" nor a multi-factored approach, and instead the

No decision of the United States Court of Appeals for the Third Circuit has squarely addressed this issue. The only Third Circuit decision to address FRE 410 and FRCrP 11(e)(6) and the effect of the 1980 amendments is United States v. Sebetich, 776 F.2d 412, 421 (3d Cir. 1985).[10] In Sebetich, a defendant challenged the introduction of statements he had made to a police officer, after approaching him in a parking lot to discuss the possibility of immunity. Id. at 416.

Sebetich held that the defendant's statements were outside the scope of FRE 410 and FRCrP 11(e)(6) for two reasons. First, the parties had not intended to reach a plea bargain agreement "during an unplanned encounter" in a parking lot before the defendant had even been charged with a crime. Id. at 422. Second, the defendant's statements "d[id] not fit within the amended rule" because they "were not made in the course of plea discussions with an attorney for the government." Id. (internal quotation omitted).

"plain language" of the rule should be applied); see also United States v. Lloyd, 43 F.3d 1183, 1186 (8th Cir. 1994) (applying a totality of the circumstances test).

[10]Two district court decisions in this circuit have applied the Robertson test, although both have questioned its continuing validity in light of the 1980 amendments to the rules. United States v. Jasin, 215 F. Supp.2d 552, 583-86 (E.D. Pa. 2002) (noting Robertson was "decided under the broader, former version of Rule 11(e)(6)."); United States v. Washington, 614 F. Supp. 144, 148-49 (E.D. Pa. 1985) (same), aff'd without opinion, 791 F.2d 923 (3d Cir. 1986); but see United States v. McNaughton, 848 F. Supp. 1195, 1201-02 (E.D. Pa. 1994) (ruling on applicability of FRCrP 11(e)(6) without reference to Robertson and applying essentially a totality of the circumstances standard).

The Sebetich court did not directly address what standard to use to determine whether statements were made in the course of plea discussions. Although Sebetich cites Robertson, it does not expressly adopt the Robertson test. In reaching its decision, however, the Sebetich court considered factors very similar to those in Robertson, evaluating whether the defendant and the government subjectively intended to enter plea bargaining and whether they could reasonably have expected to do so.

After considering the history of the rules and the reasoning of the Sebetich decision, this Court declines to apply the Robertson test. When the test was developed, its two-tiered framework was a reasoned attempt to narrow the pre-1980 version of FRE 410 and FRCrP 11(e)(6). At that time, the literal language of the rules could be read to make inadmissible statements a defendant made to anyone pertaining to an "offer to plead." The Robertson court developed its framework to limit the rules and prevent them from applying to routine conversations where a suspect tries to bargain with an arresting officer. See Robertson at 1365 ("Plea negotiations are inadmissible, but surely not every discussion between an accused and agents for the government is a plea negotiation.").

After the 1980 amendments to the rules, there is no longer a need for the Robertson test. The amended rules now, by their terms, apply only to statements made to government attorneys, not law enforcement personnel. By adopting the

current version of the rules, Congress declined to ratify the Robertson test. While the amendments were under consideration, the House Committee on the Judiciary specifically recommended that Congress modify the proposed amendments to remove the restriction that statements be made to a prosecuting attorney and instead adopt language based on Robertson requiring "both that the defendant actually believe that plea negotiations are taking place and that the belief is reasonable under all of the circumstances." H.R. Rep. No. 96-1302 at 6 (September 5, 1980).[11] Congress took no action on the Judiciary Committee proposal and allowed the amendments as originally promulgated to go into effect.

Declining to apply Robertson is also fully consistent with the Sebetich decision. Sebetich neither referred to nor adopted the test. The decision's discussion of the defendant's subjective understanding of whether plea bargaining was taking place and the reasonableness of that understanding can best be understood as elements a court should consider in evaluating the

---

[11]The revised amendment proposed by the House Committee on the Judiciary would have removed the limitation that statements be "in the course of plea discussions with an attorney for the prosecuting authority" and added language making inadmissible

> (3) any statement made in connection with and relevant to —
> (A) any of the foregoing pleas or offers; or
> (B) any discussion which the defendant reasonably believes to be a plea discussion and which does not result in a plea of guilty or nolo contendere, or results in a plea of guilty, later withdrawn or a plea of nolo contendere.

H.R. Rep. No. 96-1302 at 27.

totality of the circumstances, rather than an application of the formal Robertson test.

Accordingly, this Court will apply a totality of the circumstances standard in evaluating whether the defendant's statements should be excluded under FRE 410 and FRCrP 11(f).

III. Admissibility of Statements That The Defendant Made During The Proffer Sessions

FRE 410 and FRCrP 11(f) make inadmissible as to the defendant "any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty . . . ." The central question here is whether the statements that the defendant made during his proffer sessions with the Assistant United States Attorney were "made in the course of plea discussions" for purposes of the rules.

A. Applying The Language and Legislative History of the Rules to Statements Made in Proffer Sessions

The legislative history of FRE 410 and FRCrP 11(f) provides guidance for determining whether defendant's proffer statements fall within the rules. The rules as originally enacted were broadly worded, making inadmissible any statement made to anyone "in connection with, and relevant to . . . an offer to plead." The "major objective" of the 1980 amendments was to limit the rules to exclude "voluntary admission[s] to law enforcement officials" that some courts applying the original

rules had held inadmissible. 1979 Advisory Committee Notes. To achieve this, the rules were amended to apply only to statements to an attorney for the government.

The 1979 Advisory Committee Notes strongly suggest that this change was intended to narrow the rule only with respect to statements made to non-lawyers, but to leave unchanged the broad scope of the rules with respect to statements made to prosecuting attorneys. In describing the effect of the amended rules, the 1979 Advisory Committee Notes explain that the change was intended to "fully protect[ ] the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents." The 1979 Advisory Committee Notes also describe FRCrP 11(e)(6) as intended to encourage discussions between the "attorney for the government and the attorney for the defendant or the defendant when acting pro se . . . with a view toward reaching a plea agreement" (internal quotation omitted).

By describing plea discussions as a "process" and referring to the rules covering discussions "with a view toward reaching a plea agreement," the Advisory Committee Notes suggest that the amended rules are intended to cover more than just discussions concerning the terms of the plea itself and extend to discussions concerning the preliminary steps to a negotiated plea, including proffer sessions.

Interpreting FRCrP 11(f) and FRE 410 to apply to preliminary discussions would also accord with the way that plea negotiations are commonly conducted. In practice, the process of negotiating a plea often begins, not with a discussion of the terms of the plea, but with a proffer session and a discussion of whether the defendant is willing to cooperate and whether the government will accept that cooperation.

Indeed, in many cases, a proffer session may be a necessary pre-requisite to any discussion of a plea. As the Assistant United States Attorney in this case explained, in what he described as his "standard" speech to defendants, if a defendant wants to plead guilty and obtain the government's recommendation for a downward departure to his sentence, he needs to cooperate. But before the government will even "consider the possibility" of allowing a defendant to cooperate, it usually requires a proffer to evaluate whether the defendant has useful information and is "capable and willing to tell the truth." 1/20/05 Tr. at 101-03 (Labor Testimony); see also Benjamin A. Naftalis, "Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules, 37 Colum. J.L. & Soc. Probs. 1, 1-4 (Fall 2003).

Applying FRCrP 11(f) and FRE 410 to at least some proffer sessions would also appear to further the rule's purpose of permitting "the unrestrained candor which produces effective plea discussions." 1979 Advisory Committee Notes. The very

nature of a proffer session requires a defendant to make self-incriminating statements by detailing his involvement in the activities under investigation. If, in many cases, a proffer session is a necessary first step to discussing a plea, then protecting any incriminating statements from disclosure will encourage defendants to make proffers and reach negotiated pleas.

B. Analyzing Previous Decisions Applying the Rules to Statements Made in Proffer Sessions

Numerous cases have addressed the scope of FRE 410 and FRCrP 11(f). Most of those decisions, however, concern statements made by defendants to law enforcement personnel, not government attorneys, and so represent relatively straight-forward cases where the defendants' statements fall outside the express text of the rule.[12] Only a handful of reported cases address a situation like this one where a defendant met in a formal session with the prosecuting attorney to make a proffer, and those cases have been sharply divided.

[12]The government has cited several such cases in its briefing. United States v. Brumley, 217 F.3d 905, 910 (7th Cir. 2000); United States v. Johnson, 137 F.3d 970, 975 (7th Cir. 1998) ; United States v. Jorgenson, 871 F.2d 725, 730 (8th Cir. 1989); United States v. Porter, 821 F.2d 968, 976-77 (4th Cir. 1987); United States v. Doe, 655 F.2d 920, 925 (9th Cir. 1981); United States v. White, 617 F.2d 1131, 1133-34 (5th Cir. 1980). All of the defendants in these cases made the statements at issue to government agents, not attorneys, and the cases are therefore of limited usefulness in deciding whether Mr. Stein's statements to the Assistant United States Attorney should be suppressed.

Decisions in the United States Court of Appeals for the First and Eighth Circuits have consistently held that, unless a plea is explicitly discussed, proffer sessions with a prosecuting attorney to explore cooperation are not protected by FRE 410 and FRCrP 11(f). United States v. Morgan, 91 F.3d 1193, 1195-96 (8th Cir. 1996); United States v. Hare, 49 F.3d 447, 450-51 (8th Cir. 1995); United States v. Penta, 898 F.2d 815, 817-18 (1st Cir. 1990).

Decisions in the United States Court of Appeals for the Second Circuit, however, have consistently held that proffer sessions to discuss cooperation are covered by the rules, regardless of whether a plea is explicitly discussed. United States v. Serna, 799 F.2d 842, 848 (2d Cir.1986); Fronk, 173 F.R.D. at 68-69; see also United States v. Barrow, 400 F.3d 109, 116 (2d Cir. 2005) ("Statements made by defendants in proffer sessions are covered by Rule 410.").

The United States Court of Appeals for the Third Circuit has not yet considered any case applying FRE 410 and FRCrP 11(f) to proffer statements made to a prosecutor, but decisions in this district that have addressed the issue have been similarly divided. One opinion has found proffer discussions with prosecutors not protected by these rules. Jasin, 215 F. Supp.2d at 583-86. Another has found such discussions protected. Washington, 614 F. Supp. at 148-49.

None of the decisions holding statements in proffer sessions to be outside the scope of FRE 410 and FRCrP 11(f) are controlling here and all can be materially distinguished from the case before the Court. Morgan, Hare, and Penta all involved discussions between a prosecutor and an unrepresented defendant (although the Morgan and Hare defendants were themselves attorneys). The presence of a defense attorney makes it more likely that a proffer is part of a formal negotiated process directed toward a plea and not just a voluntary confession in hopes of leniency. See Morgan, 91 F.3d at 1196 (basing holding that rules did not apply, in part, on fact no defense attorney had been retained); Fronk, 173 F.R.D. at 68 (finding fact that the defendant waited to be assigned an attorney before beginning proffer was evidence that proffer was part of a plea negotiation). Jasin involved a defendant who, at the time of the proffer, lacked a subjective understanding that he was engaged in plea discussions because he did not believe he was a suspect. Here, defendant Stein knew he was a target of the investigation and likely to be indicted.

Moreover, to the extent Morgan, Hare, and Penta can be read as holding that statements in proffer sessions ought never be considered in the course of plea discussions for purposes of FRE 410 and FRCrP 11(f), this Court disagrees. As discussed above, the history of the rules and the comments in the Advisory Committee Notes strongly suggest that the rules were intended to

extend to proffer sessions where discussions occur between counsel for the government and counsel for the defendant "with a view toward reaching a plea agreement."

This Court finds additional support for the view that FRE 410 and FRCrP 11(f) extend to statements made in proffer sessions in cases concerning the waiver of rights under those rules. The United States Supreme Court held that FRE 410 and FRCrP 11(f) were subject to waiver in United States v. Mezzanatto, 513 U.S. 196 (1995). Many cases analyzing waiver, including Mezzanatto itself, concern waivers signed as part of a proffer agreement and therefore assume, usually without much discussion, that proffer sessions are covered by FRE 410 and FRCrP 11(f), before turning to a discussion of the elements of waiver. See Mezzanatto at 198, 200-01 (discussing meeting requested by defendant and his counsel "to discuss the possibility of cooperating with the Government" and assuming, absent waiver, that FRE 410 and FRCrP 11(e)(6) would apply); United States v. Rebbe, 314 F.3d 402, 404, 405-06 (9th Cir. 2002) (assuming proffer session with government attorney covered by rules); United States v. Krilich, 159 F.3d 1020, 1024 (7th Cir. 1998) (same).[13]

[13]Although these cases provide additional support for the view that statements made in proffer sessions are covered by FRE 410 and FRCrP 11(f), none of them can fairly be read to make an authoritative holding to that effect. In all the cited cases, the discussion of the proffer session is so cursory it is impossible to know why the court assumed the rules would apply. For example, although Mezzanatto appears to involve a proffer

C. Concluding the Defendant's Statements in His Proffer Session Were Made In the Course of Plea Discussions

After analyzing the language of the rules, their legislative history, and the cases applying them, and after considering the totality of the circumstances of the defendant's statements in his proffer session, the Court finds that the defendant's statements were made "in the course of plea discussions" and are therefore inadmissible under FRCrP 11(f) and FRE 410.

Here, the defendant made his statements to two Assistant United States Attorneys and several government agents in formal sessions arranged by his counsel. Although neither the government nor the defense expected to discuss the terms of a plea at these sessions, both sides understood that these sessions were the first step to a negotiated plea. Both the Assistant United States Attorney and defense counsel testified that the purpose of the proffer sessions was for Mr. Stein to make a full and truthful account of his involvement in the activities under investigation, in hopes of being allowed to cooperate in the

---

session like the one before this Court in which a defendant met with a prosecutor to discuss cooperation, it is unclear from the facts of both the Supreme Court opinion and the appellate opinion on review whether the session was limited to a discussion of cooperation or whether it also went on to discuss the terms of a plea. See id.; United States v. Mezzanatto, 998 F.2d 1452, 1453 (9th Cir. 1993) (referring to proffer session as a "plea bargaining meeting"); see also Rebbe at 404 (referring to the purpose of the proffer as being "to explore the possibility of a plea"); Krilich at 1024.

government's investigation, and thereby earn a downward departure to his sentence. The proffer sessions, while not discussions of the specific terms of a plea agreement, were negotiations over a central element of that eventual plea, his cooperation and a downward sentencing departure. The statements in the proffer were therefore part of the overall discussion of the plea and made "in the course of plea discussions."

Moreover, the circumstances of the proffer indicate that the defendant and defense counsel had a reasonable belief that the proffer session would be off-the-record. The draft proffer letter prepared by the government in anticipation of the meeting expressly acknowledged that defense counsel had requested an off-the-record proffer session: "You have stated that your client, Melvin Stein, is interested in meeting with the investigating agents and me for purposes of an 'off-the-record' proffer or discussion." Ex. MS-3.[14] Although the defendant refused to agree to the conditions and "ground rules" set out in that letter, neither the Assistant United States Attorney nor any other government agent at the proffer ever said that the session

[14]The defendant has suggested that, because the government's "standard" proffer letter includes a partial waiver of a defendant's rights under FRE 410 and FRCrP 11(f), the government has implicitly conceded that these rules apply to proffer sessions like the defendant's. This is not a necessary implication of the letter. The government could reasonably have included the waiver, even if it did not believe the rules covered proffer sessions, to avoid disputes like the one before the Court, or to protect its interests in the event that it was mistaken about the scope of the rules.

would be on-the-record unless the letter was signed, nor in any other way indicated that his statements might be used against him. Under these circumstances, the defendant had a reasonable belief that the off-the-record proffer requested by his counsel was being honored.

The government argues that the defendant's statements were not made "in the course of plea discussions" because there was no discussion of the actual terms of a plea during the proffer session. This argument fails for several reasons.

First, as discussed above, there does not need to be a discussion of the literal terms of a plea for a statement to be "in the course of plea negotiations." The text of the rules does not require express discussion of the terms of a plea, and the Advisory Committee Notes make clear that the rules cover preliminary statements to a prosecuting attorney "with a view toward reaching a plea agreement."

Second, requiring the actual discussion of a plea for FRCrP 11(f) and FRE 410 to apply would create inconsistent and arbitrary results. As discussed above, formal discussions between the prosecution and defense counsel often begin, not with the terms of a plea, but with a proffer session and a discussion of the terms of the defendant's cooperation. In some cases, like this one, the discussion of cooperation and the discussion of the actual terms of a plea may take place in separate conversations. In others, particularly where the government decides it does not

need the defendant's cooperation, the discussions may take place in a single session. Whether these discussions are temporally separated or not, they are as a practical matter all part of the discussions over a defendant's plea and should be protected under FRE 410 and FRCrP 11(f).

To hold otherwise would create an artificial distinction that would greatly complicate the application of the rules. Requiring an actual discussion of the terms of a plea would encourage gamesmanship, rewarding defendants who by chance or design attempt to discuss a plea in the course of their proffer. It would also in many cases require courts to draw difficult distinctions between where an admissible proffer session ended and an inadmissible plea discussion began.

At oral argument, the government was unable to explain clearly how its position would apply to cases where the defendant's proffer and the discussion of the terms of a plea took place in the same meeting. Conceding the issue was "tricky," the government took the position at argument that the mere announcement by defense counsel at the beginning of the proffer session that "we are here to engage in plea discussions" would have triggered the application of the rules and made the proffer inadmissible. 1/21/05 Tr. at 82102-03. Nothing in the rules requires such "magic words" and interpreting the rules to require them would render the rules arbitrary and unworkable.

Finally, the government's argument fails because, even if FRCrP 11(f) and FRE 410 apply only to discussions where the actual terms of a plea agreement are discussed, the terms of a plea were discussed here. At the outset of the proffer session, defense counsel raised the possibility of obtaining a downward departure for her client's cooperation under United States Sentencing Guideline § 5K1.1, announcing "we're here for – to discuss the possibility of a 5K." 1/20/05 Tr. at 28. Later during the proffer sessions, defense counsel raised the possibility of reaching an agreement under § 1B1.8 of the Guidelines to provide that information the defendant provided in cooperating could not be used against him. Id. at 26-27.

Both of these sections of the Sentencing Guidelines are terms of a plea. Provisions incorporating both sections were eventually included in the proposed plea agreement drafted by the government and ultimately rejected by the defendant. The fact that the government declined to negotiate either § 5K1.1 or § 1B1.8 during the proffer session does not change the fact that the two provisions were discussed and that the defendant offered to plead. As the 1979 Advisory Committee Notes make clear, "even an attempt to open plea bargaining is covered" under the rules. Id. (internal quotation and citation omitted).

In sum, on these facts, where a represented defendant made statements to an Assistant United States Attorney in formal proffer sessions that defense counsel specifically requested be

"off-the-record" and in which defense counsel specifically raised the issue of obtaining a § 5K1.1 departure or a § 1B1.8 agreement, the Court finds the defendant's statements inadmissible under FRCrP 11(f) and FRE 410 as statements "made in the course of plea discussions with an attorney for the prosecuting authority."

IV. Admissibility of Evidence Derived from the Defendant's Proffer Statements

The defendant has requested the suppression of any derivative evidence the government may have obtained in reliance on the statements he made in his proffer. See 1/20/04 Tr. at 6.

Neither the language nor the legislative history of these statutes shows any evidence that Congress ever contemplated, much less intended, that FRE 410 and FRCrP 11(f) would apply to derivative evidence. By their terms, these rules apply only to "statements" made in the course of plea discussions and contain no restrictions on the use of any evidence derived from those statements. The rules' legislative history is similarly silent about the inadmissability of derivative use. See United States v. Rutkowski, 814 F.2d 594, 599 (11th Cir. 1987), citing Proposed Amendments to Federal Rules of Criminal Procedure, Hearings on H.R. 6799 before the Subcomm. on Crim. Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. (1974); 121 Cong. Rec. 25,841-860 (1975).

Given the lack of any indication that Congress intended FRE 410 and FRCrP 11(f) to go beyond a defendant's statements, this Court declines to extend the rules. Had Congress intended these rules to reach derivative evidence, Congress could easily have said so explicitly, as it did in the federal use immunity statute, 18 U.S.C. § 6002, which by its express terms extends to "information directly or indirectly derived from" immunized testimony.

Every federal court to have considered the issue has similarly found that FRE 410 and FRCrP 11(f) do not require suppression of derivative evidence. Rutkowski, 814 F.2d at 598-99; United States v. Cusack, 827 F.2d 696, 697-98 (11th Cir. 1987); United States v. Millard, 235 F.3d 1119, 1120 (8th Cir. 2000); Fronk, 173 F.R.D. at 62; but see United States v. Ankeny, 30 M.J. 10, 14-15 (C.M.A. 1990) (holding substantively identical provision of the Military Code of Evidence, Mil. R. Evid. 410 should be "broadly construe[d]" to require the suppression of derivative evidence in order "to encourage plea negotiations"); Weinstein's Federal Evidence § 410.09[4] (Joseph M. McLaughlin, ed. 2d ed. 2005) ("It would seem that, to enforce the policy underlying Rule 410, the better approach would be to import the 'fruit of the poisonous tree' doctrine into this area.").

FRE 410 and FRCrP 11(f) represent a balance struck by Congress between the rules' beneficial purpose of encouraging "the unrestrained candor which produces effective plea

discussions" (1979 Advisory Committee Notes) and the countervailing cost of excluding probative evidence from the trier of fact. Altering that balance by extending the reach of the rules to derivative evidence would impose significant additional costs upon the government and the courts, including the burden of determining whether any evidence discovered after plea negotiations had begun was the inadmissible "fruit" of those negotiations. See, e.g., Kastigar v. United States, 406 U.S. 441 (1972).

It is for Congress, not this Court, to weigh those competing costs and benefits. Accordingly, this Court will decline to go beyond the plain language of FRE 410 and FRCrP 11(f) and will not extend those rules to require the suppression of derivative evidence.

V. Admissibility of Statements the Defendant Made While Cooperating with the Government

In addition to evidence from his proffer sessions, the defendant has also moved to suppress any statements he made to government agents during the period when he was cooperating with the government. The defendant contends that these statements are covered by FRE 410 and FRCrP 11(f) or, alternatively, that they are covered by an implied cooperation agreement or "informal" or equitable immunity. The Court finds no basis to suppress these statements.

A. Suppression of Cooperation Statements under FRE 410 and FRCrP 11(f)

FRE 410 and FRCrP 11(f) do not reach statements that the defendant made while cooperating. As discussed above, those rules make inadmissible statements "made in the course of plea discussions with an attorney for the prosecuting authority." Here, any statements that the defendant made while cooperating were made to government agents, not the prosecutor, in the course of recording conversations with other targets of the government's investigation, not in the course of plea discussions. Thus, by their plain terms, FRE 410 and FRCrP 11(f) do not apply. See Sebetich, 776 F.2d at 422 (rules, as amended in 1980, do not apply to statements made to government agents).

The fact that the defendant's cooperation was a direct and intended result of the proffer sessions between the parties, which the Court has found are covered by FRE 410 and FRCrP 11(f), does not bring the defendant's cooperation within the scope of the rules. FRE 410 and FRCrP 11(f) cannot be read to extend to future actions contemplated or agreed to in the course of plea negotiations. Proffer sessions and plea negotiations often result in a defendant agreeing to take some future action, such as cooperating in the government's investigation or testifying against co-defendants at trial. The resulting cooperation or testimony, however, is not itself part of the plea negotiations and does not fall within the scope of the rules. To apply the rules to activity contemplated in a plea discussion would extend

them far beyond their terms and apply their per se exclusionary rule to a broad variety of cooperative activities and subsequent testimony. This Court declines to do so and holds that the statements the defendant made while cooperating with the government are not inadmissible under FRE 410 and FRCrP 11(f).

B. Suppression of Cooperation Statements Under an Implied Cooperation Agreement

The Court finds no cooperation agreement, either express or implied, that would make the statements the defendant made while cooperating inadmissible. The defendant contends an implied cooperation agreement was created when the government offered its proposed plea agreement in December 2003 because that agreement was to contain a provision under federal Sentencing Guideline § 1B1.8 providing that no self-incriminating information provided by the defendant while cooperating was to be used against him at sentencing.

The existence and terms of cooperation and plea agreements are ordinarily determined by referring to contract principles. United States v. Nolan-Cooper, 155 F.3d 221, 236 (3d Cir. 1998) (“Plea agreements, although arising in a criminal context, are analyzed under contract law standards”); United States v. Liranzo , 944 F.2d 73, 77 (2d Cir. 1991) ("Pre-trial agreements, such as cooperation agreements and proffer agreements, are interpreted according to principles of contract law....”).

A first principle of contract law is that, absent special circumstances not present here, an offer must be accepted to form an enforceable contract. Restatement Second of Contracts § 17. Here, there is no dispute that the defendant did not accept the government's proposed plea agreement containing the § 1B1.8 provision. Having rejected the government's offer, the defendant cannot now seek to enforce one of its terms. United States v. McGovern, 822 F.2d 739, 745 (8th Cir. 1987) (prosecution is not bound by the terms of a subsequently rejected plea agreement). Accordingly, the Court finds no cooperation agreement between the parties, either express or implied, that would require suppression of the defendant's statements.

C. Suppression of Cooperation Statements under the Doctrine of Informal or Equitable Immunity

The Court finds no basis for suppressing the defendant's statements under the doctrine of informal or equitable immunity. The essential concept of equitable immunity is that "when a promise of immunity induces a defendant to ... cooperate with the government to his detriment, due process requires that the prosecutor's promise be fulfilled." United States v. Fuzer, 18 F.3d 517, 521 (7th Cir. 1994) (internal quotation marks omitted), citing Rowe v. Griffin, 676 F.2d 524, 526 n.3 (11th Cir. 1982). No decision of the United States Court of Appeals for the Third Circuit has yet adopted the doctrine,

but it has been considered by at least one other district court in this circuit and by other courts of appeal.[15]

Even assuming the doctrine would be adopted in this circuit, it does not apply here on these facts. Equitable immunity applies only where a defendant has been promised immunity and has relied to his detriment on that promise. Here, the government never made any promise of immunity to the defendant. Although the government offered the defendant limited immunity as part of its standard proffer letter, it is undisputed that the defendant refused to agree to the terms of that letter. It is also undisputed that, after the proffer letter was rejected, the government never discussed immunity, whether in the form of a cooperation agreement or a provision under U.S. Sentencing Guideline § 1B1.8 or otherwise, until it made another offer of limited immunity as part of its proposed plea agreement, which was also rejected by the defendant.

Since the defendant declined to accept the only offers of immunity made by the government, there is no promise for the doctrine of equitable immunity to enforce and no basis to suppress the defendant's statements.

---

[15] See, e.g., Reed v. United States, 106 F.3d 231, 235-36 (8th Cir. 1997); Fuzer, 18 F.3d at 521; United States v. Roberson, 872 F.2d 597, 611-12 (5th Cir. 1989); United States v. Roberts, 280 F. Supp.2d 325, 336-38 (D. Del. 2003).

D. Agreement about Questioning the Defendant Outside the Presence of Counsel

Although the Court finds no merit in any of the defendant's contractual or quasi-contractual arguments for the suppression of statements he made during his cooperation, the Court will enforce what it finds to be a limited oral agreement restricting the subjects on which Mr. Stein could be questioned outside the presence of counsel. The existence of such an agreement is to be determined according to principles of contract law. Nolan-Cooper, 155 F.3d at 236; Liranzo, 944 F.2d at 77.

The defendant's prior counsel testified that, during the proffer sessions with the government, she set one condition on the defendant's subsequent cooperation: defense counsel was to be present any time the defendant was questioned "about his own involvement in the activities" under investigation. 1/20/05 Tr. at 45 (Ainslie testimony). The government has not disputed defense counsel's testimony, and the Court finds it credible.

There is no evidence in the record, however, as to whether the government ever accepted defense counsel's condition. Neither the defense nor the government addressed this issue, either at the evidentiary hearing or in their briefs. Nonetheless, the Court finds that the government's subsequent conduct served as an acceptance under principles of contract law. See In re Penn Central Transp. Co., 831 F.2d 1221, 1228 (3d Cir. 1987) (the mutual assent necessary to form an implied-in-fact contract can be inferred from the conduct of the parties). The

government concedes that during the time Mr. Stein was cooperating, FBI agents met with Mr. Stein on a daily basis outside the presence of counsel. 1/21/05 Tr. at 21, 27 (Lewis Testimony). By doing so, the Court finds the government implicitly accepted defense counsel's sole condition for those meetings.

Although the Court finds that the government entered a binding agreement limiting its ability to question the defendant during his cooperation, there is no evidence before the Court that the agreement was ever breached. The defendant offered no testimony or other evidence that he was ever questioned outside counsel's presence about any subject.

The government's brief, however, contains passing reference to several allegedly incriminating statements made by the defendant to government agents during his cooperation. Gov't's Reply to Defendant's Post-Hearing Br. at 15 n.9. The government contends these statements were voluntary and not in response to government questioning. On the current state of the record, however, there is insufficient evidence to determine whether these statements were solicited in violation of the agreement. Accordingly, if the government intends to introduce these statements at trial, the Court will schedule an evidentiary hearing to flesh out the record and allow the Court to determine if these statements were solicited in violation of the oral

agreement with defense counsel and, if they were, whether suppression of the statements is an appropriate remedy.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL NO. 04-269-9
	:	
v.	:	
	:	
MELVIN STEIN	:	

ORDER

AND NOW, this 8th day of June, 2005, upon consideration of defendant Melvin Stein's Motion in Limine to Suppress Evidence Pursuant to FRE 410 and Fed. R. Crim. P. 11(f), defendant Stein's Post-Hearing Brief in Support of his Motion, and the government's opposition to the motion (Docket Nos. 310 and 450), and after a hearing on January 20 and 21, 2005, IT IS HEREBY ORDERED that the Motion is GRANTED IN PART and that any statements made by Mr. Stein on July 24 and August 8, 2003 during his proffer sessions with the Assistant United States Attorney are inadmissible under Rule 410 of the Federal Rules of Evidence and Rule 11(f) of the Federal Rules of Criminal Procedure as statements "made in the course of plea discussions with an attorney for the prosecuting authority." Defendant's Motion is DENIED with respect to all other evidence challenged in the Motion. The Court finds no basis to suppress either derivative evidence discovered by the government as a result of the proffer statements or statements the defendant made when he was cooperating in the government's investigation.

If the government seeks to introduce statements the

defendant made to government agents during the period when he was cooperating in the government's investigation, the Court will schedule a further evidentiary hearing to determine if the statements were solicited in violation of what the Court finds to be an enforceable agreement that, while Mr. Stein was cooperating, the government would not question him outside the presence of counsel about his involvement in the activities under investigation.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.